

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**BASF AGRO B.V., ARNHEM (NL),  
WÄDENSWIL BRANCH, BAYER  
S.A.S., and MERIAL LIMITED,**

**Plaintiffs,**

**v.**

**CHEMINOVA, INC.,**

**Defendant.**

**Civil Action No. 10-cv-274**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’  
MOTION FOR PROTECTIVE ORDER VACATING THE NOTICE OF  
JUNE 2, 2011 DEPOSITION OF PROFESSOR MICHAEL POTTER**

Pursuant to Federal Rule of Civil Procedure 26(c), Plaintiffs BASF Agro B.V., Arnhem (NL), Wädenswil Branch (“BASF”), Bayer S.A.S. (“Bayer”), and Merial Limited (“Merial”) respectfully move the Court for a protective order vacating the notice of the June 2, 2011 deposition of Michael Potter, Plaintiffs’ expert on infringement and validity issues related to Plaintiffs’ United States Patent Nos. 6,414,010 (the “‘010 Patent”) and 6,835,743 (the “‘743 Patent”) (collectively, the “Perimeter Use Patents”).<sup>1</sup>

On the afternoon of May 27, 2011, the Court issued an Opinion and Order denying Plaintiffs’ Motion for Summary Judgment in the related case captioned *BASF Agro B.V. et al. v. Makhteshim Agan of North America, Inc. et al.*, Civ. A.

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<sup>1</sup> A copy of the Notice of Deposition of Michael Potter is attached hereto as Exhibit 1.

No. 10-276. [See D.I. 173 (MANA case)]. In its Opinion and Order, the Court issued a *Markman* construction for the preambles of the asserted claims of the Perimeter Use Patents that materially altered the status of this case.<sup>2</sup> The Court applied a construction to the preambles of the Perimeter Use Patents that had not been previously stated by any party or expert, including Professor Potter. Importantly, the experts and the parties are now bound as a matter of law to follow the Court's claim construction.<sup>3</sup> The Court also suggested that its complete *Markman* order would be issued "in the near future." [D.I. 173 (MANA case) at 6 n.4].

As a result, Plaintiffs will file tomorrow a motion to stay both this case and the MANA case for 30 days. A short stay would allow the Court time to issue its full *Markman* order and to evaluate Plaintiffs' forthcoming motion for clarification of the Court's order dated May 27, which will be filed by June 8. A short stay also would permit the parties to modify their expert reports (and Defendants' to modify summary judgment motions, if they wish) to conform to the Court's claim

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<sup>2</sup> Although the Preliminary Injunction Order issued only in the MANA case, the Cheminova and MANA cases were consolidated for purposes of *Markman* on the Perimeter Use Patents. All parties consented to this procedure. The Court's claim construction of the Perimeter Use Patents therefore applies equally in both cases.

<sup>3</sup> See, e.g., *Markman v. Westview Instrs., Inc.*, 517 U.S. 370, 388 (1996) ("[I]n the actual interpretation of the patent the court proceeds upon its own responsibility, as an arbiter of the law, giving to the patent its true and final character and force."); *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005) ("the district court's claim constructions control").

construction rulings. Respectfully, permitting expert discovery on claim construction to be completed after and with the benefit of the Court's Markman ruling will be efficient and ultimately will expedite the resolution of these cases.

Under Rule 26(c), "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed. R. Civ. P. 26(c). Given that Professor Potter is required to follow the Court's claim constructions, and given that at least one construction ordered by the Court (and likely others) has not yet been considered by Professor Potter, it would be unduly burdensome and expensive to require Professor Potter to sit for a deposition on June 2. The reasonable alternative is to grant Plaintiffs' Motion for a Protective Order, and permit the parties to re-schedule Professor Potter's deposition for a date shortly after the Court has issued its complete *Markman* order and considered Plaintiffs' forthcoming motion for clarification of its May 27 order. This will provide Professor Potter a sufficient opportunity to evaluate the Court's constructions in view of his previously issued opinions, and supplement his opinions where necessary.<sup>4</sup>

For the foregoing reasons, Plaintiffs respectfully request the Court to issue an order protecting Professor Potter from attending his noticed deposition on June 2, 2011, and permitting the deposition to be re-scheduled after the Court issues its complete *Markman* order. A proposed order is submitted herewith.

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<sup>4</sup> The parties conferred on the postponement of Professor Potter's deposition, but Defendant was unwilling to agree to re-scheduling the deposition.

Respectfully submitted this 31st day of May, 2011.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants: Daniel Alan M. Ruley, [aruley@belldavispitt.com](mailto:aruley@belldavispitt.com), William K. Davis, [wdavis@belldavispitt.com](mailto:wdavis@belldavispitt.com), Christopher G. Kelly, [christopher.kelly@hklaw.com](mailto:christopher.kelly@hklaw.com), Steven L. D'Alessandro, [steven.dalessandro@hklaw.com](mailto:steven.dalessandro@hklaw.com), Robert J. Burns, [robert.burns@hklaw.com](mailto:robert.burns@hklaw.com), Joshua C. Krumholz, [Joshua.krumholz@hklaw.com](mailto:Joshua.krumholz@hklaw.com), Jitendra Malik, [jmalik@alston.com](mailto:jmalik@alston.com), John Patrick Elsevier, [jpelsevier@jonesday.com](mailto:jpelsevier@jonesday.com), Matthew W. Howell, [matthew.howell@alston.com](mailto:matthew.howell@alston.com), Judy C. Jarecki-Black, [jduy.jarecki@merial.com](mailto:jduy.jarecki@merial.com), and Frank G. Smith, [frank.smith@alston.com](mailto:frank.smith@alston.com).

This the 31st day of May, 2011.

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